IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-895

CONTROLLED SANITATION CORPORATION, *Petitioner,*

v.

DISTRICT 128 OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, et al., *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MEMORANDUM FOR RESPONDENTS IN OPPOSITION

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AUTHORITIES CITED

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QUESTION PRESENTED

Whether the Court of Appeals correctly applied controlling principles of federal labor law in holding that the "unusually broad" (Pet. App. A 9) arbitration clause of the instant collective bargaining agreement

bound petitioner to submit to arbitration all aspects of its breach of contract claim, including that the nature of respondent Unions' defense of petitioner's lawsuit entitled petitioner to substitute litigation for arbitration.

STATEMENT OF THE CASE

Prior to November, 1968, the City of Scranton, Pennsylvania, through the Bureau of Refuse of the Department of Public Works, provided residents the service of collection and disposal of refuse. Employees of the Bureau were represented for purposes of collective bargaining by Lodge 2305 and District Lodge 128 of the International Association of Machinists and Aerospace Workers, ("the Unions"), respondents herein. The collective bargaining agreement entered into between the Unions and the City in March, 1968 (Pet. App. A 17), contained a no-strike, no-lockout clause (Pet. App. A 5, A 17), and provided a procedure, available to and invokable by either party (Pet. App. A 6), for the resolution of "grievances," which the Agreement defined as "any dispute between the Employer and the Union or between the Employer and any employee concerning the effect, interpretation, application, claim of breach or violation of this Agreement or any other dispute which may arise between the parties" (Pet. App. A 5). The final step in this procedure was final and binding arbitration.[1]

[1] Petitioner's theory throughout, and its principal argument in the District Court and in the court below was that the language of the grievance procedure clause could not be read as making that procedure available to the employer. The District Court, having rendered no opinion, may have sustained that contention (Pet. App. 4, n. 4). The Court of Appeals unanimously rejected it (Pet. App. A5-A9, A17). Petitioner does not challange that rejection here.

The Agreement provided further that the agreed-upon method of dispute settlement was to be the "sole and exclusive method . . . and . . . the sole and exclusive remedy" for the resolution of "any and all grievances and disputes, as herein defined, whether or not either party to the contract considers the same as a material breach of the contract or otherwise." (Pet. App. A 7). Finally, the Agreement concluded with a statement of the parties' intent "that any agreement entered into shall be binding upon the employer and its successors and assigns. . . ." (Pet. App. A 17-A 18).

In November, 1968, the City of Scranton, having determined to contract out the responsibility for collection and disposal of refuse and having solicited bids from private contractors for that purpose, entered into a contract with petitioner, under which petitioner undertook to perform those tasks. The bid solicitation resulting in this contract specifically required the successful bidder to assume the City's rights and obligations under its collective bargaining agreement and petitioner agreed to comply with that obligation (Pet. App. A 18).

The strike from which this litigation later arose began on July 1, 1969, and continued until November 15, 1969, on which date the City terminated its refuse collection contract with petitioner. This lawsuit, in which petitioner sought to recover damages allegedly caused by the Union's breach of its contractual obligation not to strike, followed shortly thereafter (Pet. 3).

At no time did petitioner file a grievance protesting the July 1 strike, nor did it ever invoke or attempt to invoke arbitration, although the grievance procedure culminating in arbitration is established by the contract as the "sole and exclusive remedy" for resolving "any

dispute between the parties." Petitioner did not sue to compel arbitration. Instead, petitioner attempted to enforce its claimed contract right exclusively by litigation, seeking a judicial award of damages. Note 1, p. 2, *supra*.

The court below held that litigation was appropriate only to establish the existence of a contract between the parties and the availability to petitioner of the grievance procedure, including arbitration. Once the availability of the "exclusive" grievance procedure was established, petitioner was bound to follow that procedure in pursuing its claimed contractual right. The sole basis for review asserted is that the court below erred in failing to hold that the no-binding-contract claim, raised by the Unions in defense of petitioner's lawsuit, erased petitioner's contractual obligation to arbitrate.

ARGUMENT

The decision below constitutes an unexceptionable application of the by now well-established principle that "[t]he law compels a party to submit his grievance to arbitration . . . if he had contracted to do so." *Gateway Coal Co.* v. *United Mine Workers,* 414 U.S. 368, 374 (1974). Petitioner no longer denies that it "contracted to . . . submit [its] grievance to arbitration," p. 2, n. 1, *supra*. It follows that petitioner's bypassing of arbitration flouted the *Gateway* principle and that the court below correctly remanded petitioner to that remedy, which the contract itself describes as "sole and exclusive." The claimed conflict in principle is non-existent and no question of general importance warranting review by this Court is presented.

1. Petitioner first argues (Pet. 5-7), that the decision below conflicts in principle with a "clear implication" in *Drake Bakeries* v. *Bakery Workers,* 370 U.S. 254 (1962). But *Drake* implies only that repudiation by one party of its obligation to arbitrate lifts the obligation to arbitrate of the other. *Id.,* at 262-263. It does not imply that the issue of repudiation itself is justiciable rather than arbitrable. Moreover, any such implication is clearly overridden by *John Wiley and Sons* v. *Livingston,* 376 U.S. 543 (1964) and *Operating Engineers Local 150* v. *Flair Builders,* 406 U.S. 487, 491 (1972), as the court below (Pet. App. A 11-A 15), and every other court which has considered the matter (Pet. App. A 15), has recognized.

Petitioner's attempt to distinguish the affirmative defense of repudiation-waiver from other defenses held non-justiciable in *Wiley* and *Flair* on the theory that the former denies "the present existence of a contractual obligation to arbitrate" whereas the latter merely bars enforcement (Pet. 6), necessarily fall in light of the "unusually broad" (Pet. App. A9) arbitration clause in this contract, which commits to arbitration any dispute arising under the contract "or any other dispute . . . between the parties" (Pet. App. A5). *Flair Builders, supra,* at 491. Furthermore, as the court below observed (Pet. App. A12, n. 10), the attempted distinction of affirmative defenses was urged by Justice Powell in his dissent in *Flair* and was rejected *sub silentio* by the majority of the Court.

2. Petitioner next asserts that the decision below subverts national labor policy by encouraging frivolous challenges to the existence of contracts and discouraging prompt resolution of disputes on the merits. The fatal flaw here is that the allegedly frivolous repudiation did not occur until *after* petitioner, now admittedly

wrongfully (Pet. pp. 6-7), opted to sue for damages for alleged breach of the no strike clause, rather than filing a grievance, demanding arbitration, and suing to compel arbitration if the Unions rejected that demand. Petitioner could have obtained final resolution of this dispute years ago had it not insisted upon overreaching for judicial remedies to which it is disentitled by the terms of the very contract which spawns its claim. It was petitioner's pursuit of its now admittedly erroneous theory that its grievance was exempt from the arbitration clause, not any defense or position of respondent unions in the litigation, which caused the delay of which petitioner complains. As the court below recognized, there is neither precedential nor logical support for petitioner's assertion (Pet. 6-7) that the Unions' defense of the litigation operates to relieve petitioner of an otherwise binding contractual obligation to arbitrate. Pet. App. A4, n. 3. Accord: *Bressette* v. *International Talc Co.*, 91 LRRM 2079, 2080, n. 6, 2 Cir., 1975.

On the facts of this case, the justiciability of "repudiation" as an affirmative defense to the obligation to arbitrate is not presented. Petitioner cannot claim that the Unions frustrated its resort to arbitration, for petitioner filed no grievance against the strike and never even requested arbitration. There was thus no occasion for the district court to reach the question whether the unions had directly repudiated their promise to arbitrate (*see Blake Construction Company* v. *Laborers Int'l Union*, 511 F.2d 324, 327 (D.C. Cir., 1975)), or whether there was a good faith basis for such direct repudiation (see *Mogge, et al.* v. *District No. 8, Int'l Association of Machinists*, 387 F.2d 880, 882-883 (7th Cir., 1967)). In this case, therefore,

"compel[ling the] employer[ ] to honor" his agreement to arbitrate in every respect promotes national labor policy. *Operating Engineers Local 150* v. *Flair Builders*, 440 F.2d 557, 561 (7th Cir., 1971) (Stevens, J., dissenting), rev'd, 406 U.S. 487 (1972).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied

Respectfully submitted,

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